No. 86 1706

IN THE

Supreme Court of the United States

October Term, 1986

WALTER J. KELLY, Superintendent,
Attica Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

-against-

GREGORY JOHNSTONE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—August Term, 1986

(Argued: September 22, 1986

Decided: December 24, 1986)

Docket No. 86-2199

GREGORY JOHNSTONE,

Petitioner-Appellant,

— v. —

WALTER J. KELLY, Superintendent, Attica Correctional Facility,

Respondent-Appellee.

Before:

VAN GRAAFEILAND, MESKILL, and NEWMAN,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Charles L. Brieant, Jr.,

Chief Judge) denying a petition for a writ of habeas corpus challenging petitioner's state court conviction.

Reversed and remanded.

James C. La Forge, New York, N.Y. (Philip L. Weinstein, New York, N.Y., on the brief), for petitioner-appellant.

Esther Furman, Asst. Atty. Gen., New York, N.Y. (Robert Abrams, Atty. Gen., Maryellen Weinberg, Robert J. Schack, Asst. Attys. Gen., New York, N.Y., on the brief), for respondent-appellee.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents the issue whether denial of a defendant's constitutional right to represent himself at a criminal trial can be harmless error. The issue arises on an appeal by Gregory Johnstone from a judgment of the District Court for the Southern District of New York (Charles L. Brieant, Jr., Chief Judge) denying his petition for a writ of habeas corpus to challenge his state court conviction. Although concluding that the state trial court infringed Johnstone's Sixth Amendment right to self-representation, the District Court dismissed Johnstone's petition upon a finding that the constitutional violation was harmless error. 633 F. Supp. 1245, 1250-51 (1986). Because the District Court erred in applying a harmless error test to a violation of the right to self-representation, we reverse the District Court's decision and remand with

instructions to order petitioner's release unless the State promptly affords him a new trial.

Background

In 1981, the State of New York indicted Johnstone on arson and burglary charges in connection with the destruction of an apartment building in New York City. His first trial in the Supreme Court of New York ended in a mistrial when the jury failed to agree on a verdict. At that time Johnstone was represented by Ira Van Leer, a court-appointed attorney.

On January 4, 1982, two days before the scheduled start of his second trial, Johnstone appeared before Judge Burton G. Roberts to request that Atty. Van Leer be relieved as his counsel and that new counsel be appointed. Judge Roberts denied Johnstone's requests. On January 5, 1982, Johnstone appeared before Judge Arnold G. Fraiman, the judge presiding over his second trial, to renew his request for different appointed counsel. At that time, Johnstone expressed his displeasure with Atty. Van Leer's handling of the case; in particular, he objected to Atty. Van Leer's filing of a notice of an insanity defense in the first trial without consulting Johnstone. Judge Fraiman found these grounds inadequate to justify appointment of new counsel. Upon learning that he could not obtain new counsel, Johnstone stated that he preferred to conduct his own defense rather than be represented by Atty. Van Leer. Judge Fraiman inquired into Johnstone's age, education, employment, and familiarity with legal proceedings. Judge Fraiman then contrasted Johnstone's abilities with those of Atty. Van Leer, pointing out that Van Leer had avoided a conviction in the first trial. Emphasizing Johnstone's comparative youth, lack of legal training, and minimal experience with legal proceedings, Judge Fraiman

repeatedly warned Johnstone of the grave risks of defending himself against serious charges.

Despite Judge Fraiman's stern warnings, Johnstone persisted in his request to proceed *pro se*. Johnstone stated that he had studied the indictment and had carefully read the papers in his case each night. Upon the court's direction to Van Leer to continue his representation of Johnstone, Van Leer amplified Johnstone's remarks, noting that "[Johnstone] is intelligent, he reads all the minutes. He has all the minutes. He can proceed." Judge Fraiman acknowledged that Johnstone was competent to stand trial; nonetheless, he concluded that Johnstone was "not qualified" to represent himself because he lacked "the requisite education, background or training or experience." Judge Fraiman found that "[Johnstone] is eighteen, he has scarcely any formal education so far as I can ascertain, he has no known occupation and he has virtually no previous exposure to legal procedures, except for the first trial."

At the commencement of trial on January 6, 1982, Johnstone asked to make the opening statement and to begin cross-examination of the witnesses. Judge Fraiman ruled that petitioner could not conduct the defense himself and directed Van Leer to make Johnstone's opening statement. Van Leer conducted Johnstone's defense during the presentation of evidence. At the close of evidence, Johnstone asked to make the closing argument. After vehemently discouraging Johnstone from attempting his own summation, Judge Fraiman allowed Johnstone to present his summation himself. The jury subsequently convicted Johnstone.

Upon exhaustion of state court remedies, Johnstone filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982) with the District Court. Chief Judge

Brieant found that Johnstone had knowingly and voluntarily waived his right to counsel. Although concluding that the trial judge violated Johnstone's Sixth Amendment right to proceed *pro se*, the District Judge held that such error was harmless and therefore refused to grant the writ. 633 F. Supp. at 1250-51.

Discussion

We agree with Chief Judge Brieant that the state trial court violated Johnstone's Sixth Amendment right to proceed *pro se*. In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court declared that this right may be exercised by all criminal defendants who knowingly, voluntarily, and unequivocally waive their right to appointed counsel. *Id.* at 835-36. The record in the present case indicates that Johnstone was competent to stand trial and that he clearly sought to represent himself after being duly warned of the risks of doing so. Nevertheless, Judge Fraiman denied this request on the ground that Johnstone lacked the "requisite education, background or training or experience." *Faretta* imposes no such qualifications on the right to defend *pro se*.

The State of New York contends that Johnstone sought to represent himself merely as a threat designed to obtain different appointed counsel.[1] Though the record indicates

[1]The State attempts to bolster its "no waiver" argument by suggesting that criminal defendants generally will use the threat of self-representation as a means for obtaining different appointed counsel. We find this argument wanting because the risk of having to defend serious criminal charges without any lawyer should a request to proceed *pro se* be granted seems to outweigh any advantage from obtaining different counsel. *Cf. Faretta v. California, supra*, 422 U.S. at 834-35 n.46 (noting that a defendant who exercises his right to appear *pro se* "cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel' ").

that Johnstone preferred to have new counsel appointed, it also indicates that Johnstone steadfastly sought to represent himself despite numerous warnings from Judge Fraiman of the risks of forgoing counsel.[2] We agree with Chief Judge Brieant's conclusion that Johnstone's persistent requests to represent himself satisfied *Faretta*'s requirement of a knowing, voluntary, and unequivocal waiver of the right to appointed counsel.

We are not unmindful of trial judges' concern with ensuring that criminal defendants receive adequate legal representation. Although the Constitution prohibits courts from requiring criminal defendants to be defended by counsel, *see Faretta v. California, supra*, 422 U.S. at 833, it does not foreclose trial courts from using less overbearing means of ensuring that *pro se* defendants have adequate legal representation. In cases in which the trial judge fears that a *pro se* defendant lacks the ability to defend himself adequately, the judge can appoint counsel to assist the defendant in his *pro se* defense. *See Faretta v. California, supra*, 422 U.S. at 834-35 n.46; *McKaskle v. Wiggins*, 465 U.S. 168, 183-85 (1984). Such "standby counsel" should not, however, assume the primary role in defending unless the defendant so requests. *See id.* at 181-83.

The principal issue on this appeal is whether the state trial court's violation of Johnstone's Sixth Amendment right to proceed *pro se* requires reversal automatically or may be disregarded if properly determined to be harmless error. Chief Judge Brieant determined that the denial of

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[2]A request to proceed *pro se* is not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel. *See Faretta v. California, supra*, 422 U.S. at 810 n.5, 835-36; *United States v. Denno*, 348 F.2d 12, 14 n.1, 16 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966).

the right to proceed *pro se*, like certain other procedural rights, is subject to harmless error analysis. *See Chapman v. California*, 386 U.S. 18 (1967); *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1436 (1986). Applying this standard, the District Court denied Johnstone's petition for a writ of habeas corpus. 633 F. Supp. at 1250-51.

Although the Supreme Court has never directly confronted the question raised by this appeal, it has strongly suggested in two recent cases that denial of the Sixth Amendment right to self-representation can never be harmless error. In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Supreme Court addressed the proper role of standby counsel where a criminal defendant has elected to proceed *pro se*. In concluding that the right to self-representation must impose some limitations on the level of participation by standby counsel, the Court commented:

> Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

McKaskle v. Wiggins, supra, 465 U.S. at 177 n.8.

The Supreme Court endorsed this reasoning in *Flanagan v. United States*, 465 U.S. 259 (1984). In *Flanagan*, the petitioners claimed that the disqualification of counsel of their choice had deprived them of the Sixth Amendment right to assistance of counsel. In finding that such a denial was not a collateral order reviewable prior to final judgment, the Supreme Court noted:

> Petitioners correctly concede that postconviction review of a disqualification order is fully effective to

> the extent that the asserted right to counsel of one's choice is like, for example, the Sixth Amendment right to represent oneself. See *Faretta v. California*, 422 U.S. 806 (1975). Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. See *McKaskle v. Wiggins, ante*, at 177-178, n.8.... No showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defense is presumed.

Flanagan v. United States, supra, 465 U.S. at 267-68.

The Supreme Court's statements in *McKaskle* and *Flanagan* reflect its approach to the harmless error doctrine in the context of constitutional claims. The Court developed the doctrine of harmless error in order to preserve convictions resulting from fair trials in cases in which some immaterial error occurred. *See Chapman v. California, supra*, 386 U.S. at 23-24; *Delaware v. Van Arsdall, supra*, 106 S. Ct. at 1436-37. Since a conviction will be upheld only if the result would almost certainly have been the same had the error not occurred, the doctrine promotes judicial economy without sacrificing fairness. However, despite the strong public interest in judicial economy, the Supreme Court has recognized that some constitutional errors require reversal without regard to whether such errors might have affected the outcome of the trial. *See Chapman v. California, supra*, 386 U.S. at 23 n.8, and accompanying text; *Delaware v. Van Arsdall, supra*, 106 S. Ct. at 1437.

Since harmless error analysis serves to promote fair outcomes at trial, its application has generally been lim-

ited to denial of rights accorded defendants to facilitate their defense or to insulate them from suspect evidence. *See Chapman v. United States,* 553 F.2d 886, 891-92 (5th Cir. 1977). Harmless error analysis has not been applied to rights that are essential to the fundamental fairness of a trial or that promote systemic integrity and individual dignity. Thus, a state cannot rely upon a coerced confession, *Payne v. Arkansas,* 356 U.S. 560 (1958), it must provide a trial before an impartial tribunal, *Tumey v. Ohio,* 273 U.S. 510 (1927); *Vasquez v. Hillery,* 106 S. Ct. 617, 622-24 (1986), it must provide an indigent accused with counsel upon request, *Gideon v. Wainwright,* 372 U.S. 335 (1963), and it cannot win conviction in a jury trial upon a directed verdict. *See Rose v. Clark,* 106 S. Ct. 3101, 3106 (1986) (citing *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572-73 (1977)). These rights relate to either fundamental fairness or systemic integrity and individual dignity.

The right to self-representation derives principally from interests beyond ensuring that trial outcomes are fair. *See Chapman v. United States, supra,* 553 F.2d at 891-92. The Sixth Amendment's right to self-representation reflects values of individual integrity, autonomy, and self-expression. *See Faretta v. California, supra,* 422 U.S. at 834; *Flanagan v. United States, supra,* 465 U.S. at 268. Violation of the right to self-representation sacrifices these values even in the absence of effect on the outcome of the trial. *See id.*

Application of harmless error analysis is particularly inappropriate to denial of the right to self-representation because a harmless error standard would, in practical effect, preclude vindication of the right. Since seasoned appointed counsel can almost invariably provide better

legal representation than a *pro se* defendant, denial of a request to proceed *pro se* could rarely, if ever, be shown to have been prejudicial. The Supreme Court emphasized this concern in *McKaskle v. Wiggins, supra,* 465 U.S. at 177 n.8.

For all of these reasons, we agree with the five circuits that have concluded that violation of a defendant's right to proceed *pro se* requires automatic reversal of a criminal conviction.[3] *See Dorman v. Wainwright,* 798 F.2d 1358, 1370 (11th Cir. 1986); *United States v. Rankin,* 779 F.2d 956, 960-61 (3d Cir. 1986); *Wilson v. Mintzes,* 761 F.2d 275, 286 (6th Cir. 1985); *Bittaker v. Enomoto,* 587 F.2d 400, 403 (9th Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); *Chapman v. United States,* 553 F.2d 886, 891-92 (5th Cir. 1977).

In applying a harmless error test to denial of the right to self-representation in *Johnstone,* Chief Judge Brieant was influenced most strongly by the Supreme Court's recent decision in *Delaware v. Van Arsdall,* 106 S. Ct. 1431 (1986). In *Van Arsdall,* the Court required application of harmless error analysis to a denial of a defendant's confrontation rights under the Sixth Amendment by improper restriction of cross-examination designed to show that a prosecution witness was biased. The confrontation right was not deemed so vital to the fundamental

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[3]This conclusion does not disturb our holdings in *Hodge v. Police Officers: Colon, #623; and Repuerto, #145,* 802 F.2d 58, 62 (2d Cir. 1986), and *Jenkins v. Chemical Bank,* 721 F.2d 876, 880 (2d Cir. 1983), applying a harmless error analysis to denial of appointed counsel in cases in which a statute permits the district court to appoint counsel. *See* 28 U.S.C. § 1915(d) (1982); 42 U.S.C. § 2000e-5(f) (1982). Since the authority for appointed counsel in these civil cases is statutory and is within the broad discretion of the trial court, denial of a request for appointed counsel does not invoke the same level of concern for systemic integrity and individual dignity as is presented here

fairness of every trial as to require automatic reversal for any impairment of the right. *See Delaware v. Van Arsdall, supra,* 106 S. Ct. at 1437-38. Moreover, application of a harmless error standard to the confrontation right does not invariably preclude its vindication; denial of the right of confrontation can prejudice the outcome of a trial. *See Delaware v. Van Arsdall, supra,* 106 S. Ct. at 1437-38 (discussing *Davis v. Alaska,* 415 U.S. 308 (1974)). Nothing in the *Van Arsdall* opinion contradicts the statements in *McKaskle* and *Flanagan* regarding the inapplicability of harmless error analysis to violations of the right to self-representation nor suggests that the harmless error doctrine should be expanded beyond its traditional domain. In fact, *Van Arsdall* reaffirms that

> some constitutional errors—such as denying a defendant the assistance of counsel at trial, or compelling him to stand trial before a trier of fact with a financial stake in the outcome—are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.

Delaware v. Van Arsdall, supra, 106 S. Ct. at 1437 (citations omitted).

Conclusion

For the foregoing reasons, we reverse the District Court's denial of the writ of habeas corpus and remand to the District Court with instructions to order the petitioner's release unless the State promptly affords him a new trial.

Reversed and remanded.

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EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—August Term, 1986

Motion for clarification of
mandate submitted: February 5, 1987
Decided: March 2, 1987)

Docket No. 86-2199

GREGORY JOHNSTONE,
Petitioner-Appellant,

— v. —

WALTER J. KELLY, Superintendent, Attica Correctional Facility,
Respondent-Appellee.

Before:

VAN GRAAFEILAND, MESKILL, and NEWMAN,
Circuit Judges.

PER CURIAM:

On December 24, 1986, we ruled that the petitioner-appellant, Gregory Johnstone, was entitled to his release from custody unless the State of New York promptly afforded him a new trial. *Johnstone v. Kelly*, 808 F.2d 214 (2d Cir. 1986). That ruling resulted from a holding that Johnstone's state court conviction had been obtained in violation of his constitutional right to represent himself. The State now seeks a clarification of the mandate endorsing its view that the State can satisfy its obligation to Johnstone by affording him a retrial at which he would be required to represent himself. The State, now represented by the District Attorney for New York County,[1] contends that since the only constitutional defect in Johnstone's conviction was denial of the right to proceed *pro se*, the State need only provide a retrial at which Johnstone represents himself. If Johnstone is permitted to be represented by counsel at the retrial, the argument continues, he will "receive again what the state once provided him." Memorandum of Appellee on Motion to Clarify Mandate at 3.

The State's position is not well taken. The Sixth Amendment guarantees Johnstone the right to represent himself, if he so chooses, at any trial the State may initiate. But the Amendment also assures him the right to have the assistance of counsel. At Johnstone's first trial, he assessed the circumstances then confronting him and elected to represent himself. The unjustified denial of that request led to a conviction that was successfully challenged by a petition for a writ of habeas corpus. If the State elects to retry Johnstone rather than release him, the

[1]The motion of the District Attorney to be substituted for the Attorney General of New York is granted.

State will be obligated at any retrial to afford Johnstone all of his constitutional rights, including the right to have the assistance of counsel and the right to represent himself. In deciding which component of his Sixth Amendment right he wishes to exercise at a retrial, Johnstone is entitled to assess the circumstances then confronting him and decide whether representation by counsel or proceeding *pro se* will best serve his interests at the retrial.

If Johnstone elects to be represented by counsel at a retrial, it is not quite true, as the State contends, that he will again receive what the State once provided him. Though the State previously provided him with counsel, it denied him the choice whether to have counsel or proceed *pro se*. It is that choice that must be accorded at a retrial, if the State exercises its option to retry the petitioner.

The motion to recall and clarify the mandate is denied.

EXHIBIT C

GREGORY JOHNSTONE,

Petitioner,

v.

WALTER J. KELLY, Superintendent,
Attica Correctional Facility,

Respondent.

No. 85 Civ. 9444 - (CLB)
United States District Court
S.D. New York
April 29, 1986

(reported at 633 F. Supp. 1245)

MEMORANDUM AND ORDER

BRIEANT, District Judge.

By his petition and supporting memorandum of law filed on December 3, 1985, Petitioner Gregory Johnstone, a state prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On behalf of respondent, the Attorney General of the State of New York filed a memorandum of law in opposition to petitioner's application on January 21, 1986. Petitioner filed a Reply Memorandum of Law on February 4, 1986.

Petitioner's first trial on the underlying indictment resulted in a hung jury. He was tried a second time (Fraiman, J.) and was convicted on March 17, 1982 in Supreme Court, New York County, of arson in the second degree,

N.Y. Penal Law § 150.15, and burglary in the first degree, N.Y. Penal Law § 140.30. He was sentenced to concurrent indeterminate terms of imprisonment from three to nine years on each count. The Appellate Division, First Department, affirmed petitioner's conviction on December 18, 1984. Petitioner's application for Leave to Appeal to the New York State Court of Appeals was denied on April 15, 1985. State remedies have been exhausted.

On November 16, 1980, at approximately 2:30 A.M., petitioner and two accomplices pried open the door of apartment #8 in an apartment building at 115 West 143rd Street, New York City. Once inside, they set fire to the apartment. The fire totally destroyed apartment #8 and caused damage to the

apartments on the floors above. Several tenants in the building and a fire-fighter suffered injuries as a result of the fire.

In support of his application for a writ of habeas corpus, petitioner interposes a Sixth Amendment claim founded on the trial court's refusal to permit petitioner to relinquish his court-appointed counsel before trial and to conduct his own defense without the attorney's assistance. Respondent acknowledges that petitioner had invoked his constitutional right to represent himself, but contends that his request properly was denied because his intentions as expressed were not unequivocal and because his purported waiver of counsel was neither knowing nor inteligent.

Petitioner was represented in his first trial by a court-appointed attorney, Ira Van Leer. The jury failed to return a verdict and a mistrial was declared. Two months later, a jury was empaneled for a second trial on the same indictment. Mr. Van Leer remained the attorney of record for the petitioner. On January 5, 1982, the day before the commencement of the second trial, petitioner informed the court that he was dissatisfied with his present counsel and that he desired the services of a new attorney. The court denied petitioner's request. Petitioner then indicated that he wanted to represent himself at trial. In response, the court inquired into petitioner's education, age, employment and exposure to legal proceedings. (Tr.

6-7, 10). Detailing both the perils of self-representation and the comparative advantages of utilizing, cost free, the skills, training and experience of a seasoned defense attorney, the trial judge reminded petitioner of the seriousness of the crimes with which he was charged and the possible consequences of a conviction. Further, in response to the street-wise petitioner's proclamation that as a pro se defendant he would refuse to participate in the trial in his own defense and hence lay the foundations for a mistrial or reversal of the conviction (Tr. 6, 12), the trial judge explained patiently to him that he could not count on a reversal or retrial. (Tr. 6, 13). When petitioner persisted, the court conceded that he was competent

(Tr. 25), but ruled that because of his age, education and vocational and legal inexperience, he was not qualified to conduct his own defense. (Tr. 27-28). The court directed Mr. Van Leer to continue as petitioner's defense counsel (Tr. 17-22) and stated for the record that the petitioner was not proceeding pro se. (Tr. 26).

Without intending any criticism of this particular trial judge, who is well known for patience, devotion to justice and hard work, we are constrained to observe that in this era of oppressive Big Government, there is a lamentable tendency on the part of bureaucrats generally, including some judges to undertake the task of Big Daddy, and compel persons who are sui juris to do that which is in their best

interests whether they like it or not. There is an ever increasing tendency to act against individual freedom, while motivated by good intentions, based often in elitism or a perception that everyone else in the world is stupid. This "compulsory seat belts" thinking is demonstrated by much of the colloquy in this case:

The Defendant: I don't want him [Attorney Van Leer]. Why are you bothering me? I said I do not want the man point blank. I do not want him. Why you keep bugging me about it? I don't want the man.

The Court: You don't have the experience or the training to defend yourself.

The Defendant: Yes, I do. I will just sit right there. (Tr. 16).

* * * *

The Defendant: I don't want him.

The Court: That may well be, but I am not going to allow you to represent yourself. (Tr. 17).

* * * *

The Court: He is not capable of defending himself at trial.

Mr. Van Leer: He is intelligent, he reads all the minutes. He has all the minutes, he can proceed. His anger is generated towards me. (Tr. 18-19).

* * * *

Mr. Van Leer: My being here with him would only generate disruption or something. I do not want to disrupt the proceedings.

The Court: As a member of the bar and an officer of the Court, it is your duty to defend the Defendant to the very best of your ability. I know that you will do that. (Tr. 19).

* * * *

Mr. Van Leer: He may want to cross examine himself.

The Court: You are conducting this defense, not the Defendant. (TR. 21).

The Court terminated the discussion by saying:

The Court: I see no indication that the Defendant is not competent. He seems perfectly competent. I think he is being stubborn and is not thinking things through. I see no indication he is not competent. (Tr. 25).

At page 27 of the record, the prosecutor remonstrated tactfully with the Court to no avail. The Appellate Division affirmed petitioner's conviction without even discussing the point.

On January 6, 1982, before trial began and outside the presence of the jury, the petitioner asked to make the opening statement and to begin cross-examination of the witnesses. (Tr.

33-34). The court denied the request. Over petitioner's protests Mr. Van Leer conducted petitioner's defense. Petitioner engaged in colloquy with the trial judge during the course of trial, but never while the jury was present. Finally, at the close of evidence, Mr. Van Leer informed the trial judge that petitioner wished to make his closing argument personally. Although questioning petitioner's qualifications, the Court relented and permitted petitioner to make the summation. After two days' deliberation, the jury returned a verdict of guilty. The conduct of the trial was in all respects fair and petitioner's guilt was established clearly, beyond a reasonable doubt.

The Sixth Amendment guarantees

a criminal defendant not only the right to the assistance of counsel but also the corollary right to dispense with counsel and to present his defense in the manner of his choosing. See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This right to represent oneself against the marshalled forces of government, to undertake personally to convince a jury of one's innocence, embodies principles of individual integrity, autonomy and self-expression so fundamental to our system that its abrogation calls into question the entire fabric of an individual's innate personal liberty.

The Constitution is a seamless web of rights and liberties--not conferred but guaranteed--against the intrusive, offensive and sometimes

paternalistic presence of Big Government. When a criminal defendant elects to stand at the Bar in his own defense, and he does so knowingly, voluntarily and unequivocally, a court is bound by the Constitution to honor that election, however suicidal it may appear to be. At trial, the criminal defendant is confronted with the possible loss of his liberty, his dignity and a host of other things; on this occasion perhaps above all others, he is entitled to speak freely, to control his own future and exercise his free will. That this course may hasten and/or lengthen his incarceration is of no moment and should not concern the trial judge. The Sixth Amendment affords no lesser rights to the foolish than to the wise. If freely chosen, the

right to go to trial without counsel is protected by Constitutional, and indeed natural, law.

We next consider whether petitioner, being fully informed, deliberately and voluntarily waived assistance of counsel and unequivocally sought to undertake his own defense. The trial court did not find that he did not do so, nor is there anything in the record which would suggest such a finding. There is no indication in the trial record that the petitioner, then aged 18, was under any legal or mental disability that impaired his capacity to manage his own affairs. Indeed, his appointed counsel informed the judge that petitioner had familiarized himself with the indictment, the minutes of the first trial and other significant

documents relating to his defense. Once apprised of petitioner's intentions to reject Mr. Van Leer's free representation, even in the absence of substitute counsel, the trial judge entered into a discourse with petitioner explaining the pitfalls of self-representation and advising him to reconsider his decision. Although he found that the petitioner lacked the education, training or experience to conduct his defense skillfully, at least by contrast to his appointed counsel, the judge conceded that the petitioner was "perfectly competent" and observed that he was just being stubborn. (Tr. 25). A free American has the right to be stubborn. Under the Constitution, the inquiry should have ended there.

However benign or protective

his motives, however firmly he believed that the petitioner was "not thinking things through (Tr. 25), the trial judge should have acceded to petitioner's request. The standard in such cases is not what the judge thought was in petitioner's best interest, but what petitioner believed to be such, after being fully informed. As our Court of Appeals has observed, "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner." United States v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)(Waterman, J.), cert. denied, 384 U.S. 1007, 86 S.Ct. 1950, 16 L.Ed.2d 1020 (1966).

Respondent challenges the

intelligence of petitioner's election by suggesting that he chose to waive his right to counsel only because he hoped to parlay his pro se defense into a mistrial and reversal, and, ultimately, a new lawyer. At the outset, the Court observes that such inquiry into petitioner's motivations is improper, just as the cause for his claimed disenchantment with his attorney is of no proper concern to the Court when presented in his context. See United States ex rel. Jackson v. Follette, 425 F.2d 257, 259 (2d Cir. 1970). If voluntarily and unequivocally invoked before trial after being fully inquired of and informed by the Court, the right to defend pro se is absolute. See United States v. Brown, 744 F.2d 905, 908 (2d Cir. 1985).

The record here shows no misunderstanding by petitioner of the possible consequences of his decision or the absence of an intelligent waiver. The trial judge warned him on at least two occasions that his election to forego counsel could increase the likelihood of conviction. On both occasions the petitioner said he understood that risk. That petitioner's decision to defend pro se may have been precipitated by the court's proper refusal to incur trial delay in order to obtain substitute counsel at that late stage, does not diminish the genuineness, validity or singlemindedness of petitioner's election. Similarly, petitioner's equivocation as to the character of his intended defense--whether to participate

or sit inert--does not compromise his decision to go to trial without counsel.

The Court is convinced from the record as a whole that petitioner was fully aware of the possible consequences of his decision, but that he nevertheless adhered to his rejection of Mr. Van Leer's assistance. As the petitioner himself reminded the court, this is his trial (Tr. 17) and, indeed, the Constitution guarantees that his defense, should he choose to interpose one, is his defense. See McKaskle v. Wiggins, 465 U.S. 168, 173, 104 S.Ct. 944, 949, 79 L.E.2d 122 (1984); Faretta, supra 422 U.S. at 821, 95 S.Ct. at 2354. Unwanted appointed counsel, however skillful, represents no one but the perceived need of Big Government to deprive individuals of their freedom of

action, supposedly to keep the scales of Justice in balance. Those bureaucratic interests must yield to petitioner's constitutional right.

Having found that the Sixth Amendment rights of Mr. Johnstone to proceed without an attorney were violated by the trial court intentionally and after notice, we must consider what is to be done about it at this stage. As noted earlier, guilt in this case is clear. The purpose of any system of criminal justice including our own is not simply to preserve for their own sake, as tribal relics of our forebears' troubles with King John, some peculiar notions as to how criminal trials should be conducted. Rather, we seek to establish and maintain a system which with minimal social and

transactional cost will assure insofar as possible that the guilty will be convicted and punished, and that innocent people and those whose cases are doubtful will be set free. In doing this we must recognize that there is perfect trial, just as there is no perfect crime. See Delaware v. Van Arsdall, ____ U.S. ____, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); United States v. Hasting, 461 U.S. 499, 508-09, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983).

To assure that we do not exalt theory over substance, and to protect society's interest in a practical fashion, the Supreme Court has endorsed the doctrine of harmless constitutional error. Chapman v. United States, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705

(1966). Accordingly, it should not be necessary to set aside this conviction and require a new trial of this obviously guilty felon, if, upon the record before this Court, we can say that the constitutional error was harmless beyond a reasonable doubt.

There is some difficulty with this concept. As recently as January 23, 1984 in McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 at footnote 8, a majority of the Court, per Justice O'Connor, issued the following dictum on the subject:

> "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is

> either respected or denied; its deprivation cannot be harmless."

The premise set forth in that footnote seems hardly self-evident. Nor is it required as a holding by the facts in McKaskle. In that case, the respondent state prisoner had been permitted to proceed pro se. The trial court had appointed standby counsel to assist him. On appeal following conviction, defendant-respondent claimed that his Sixth Amendment right to conduct his own defense was violated by standby counsel's unsolicited excessive involvement. The holding of McKaskle is simply that the regulation by the trial court of the activities of standby counsel appointed to assist a defendant who is proceeding pro se will be upheld providing

no substantial right is adversely affected.

As can be seen, the footnote quoted above is not necessary to the resolution of the issues presented to the Supreme Court in McKaskle. Harmless error exists and should be found whenever it would be a useless waste of judicial resources to retry a case, as, for example, when it can be shown beyond a reasonable doubt that the constitutional violation could not have affected the outcome of the trial. Chapman, supra 386 U.S. at 22, 87 S.Ct. at 827.

On April 7, 1986 the Supreme Court decided Delaware v. Van Arsdall, ____U.S.____, 106 S.Ct. 1431, 89 L.Ed.2d 674. There, in an opinion by Justice Rehnquist joined by three

members of the majority in McKaskle, the Court employed harmless error analysis to uphold the state court conviction of the respondent whose confrontation right under the Sixth Amendment had been violated. The court conceded that the trial court improperly had restricted cross-examination designed to show bias, but concluded that this clearly erroneous ruling could be found to be "harmless in the context of the trial as a whole." Id. at_____, 106 S.Ct at 1433. As might be anticipated, the majority in Van Arsdall failed to cite or comment upon footnote 8 in the McKaskle case. It would seem at least to this writer that the opportunity to show bias on the part of prosecution witness by cross-examination is a more valuable and more practical Sixth

Amendment right than the right with which we are presently concerned; a fortiori if an unfair and improper curtailment of cross-examination can be harmless error in a Sixth Amendment context, then an unfair and improper denial of the right, in the words of the late Judge Waterman, to "go to jail under his own banner" should also be susceptible to harmless error analysis.

Our task would be easier if the Supreme Court would refrain entirely from footnotes, and curtail gratuitous observations (dicta) not required by the case. Our situation would be improved even more if subsequent decisions inconsistent with such dicta would cite and disapprove these prior expressions. Whatever the reasons of practicality that prevent the Supreme Court from

doing this, we conclude that under the current Sixth Amendment jurisprudence as reflected in Van Arsdall, the clear constitutional violation present in this case is susceptible of harmless error analysis notwithstanding the dictum in McKaskle. Also, in the total context of Johnstone's case, denial of his right to represent himself was harmless error beyond a reasonable doubt.

For this reason the petition is denied. The Clerk shall enter final judgment.

Because this petition presents a serious issue upon which reasonable persons could differ, the Court directs that a certificate of probable cause to appeal shall issue pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure. With no

irony intended, the Clerk of the Court of Appeals, on receipt of a Notice of Appeal, is respectfully requested to appoint counsel for petitioner. See 28 U.S.C. § 1915(a); Rule 24(a), F.R.App.P.

So Ordered.

EXHIBIT D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of December one thousand nine hundred and eighty-six.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND

HON. THOMAS J. MESKILL

HON. JON O. NEWMAN

Circuit Judges,

----------x

GREGORY JOHNSTONE, :

Petitioner-Appellant, :

v. : No. 86-2199

WALTER J. KELLY, Superinterintendant, Attica Correctional Facility. :

Respondent-Appellant.

----------x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the JUDGMENT of said District Court be and it hereby is REVERSED and the action be and it hereby is REMANDED to te said district court for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH
CLERK,

By: /s/ EDWARD J. GUARDARO,
EDWARD J. GUARDARO,
DEPUTY CLERK

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART: 57

THE PEOPLE OF THE STATE OF NEW YORK,	:	IND.
-against-	:	110/81
GREGORY JOHNSTONE, Defendant.	:	Charge: Arson First Degree
	:	Trial

111 Centre Street
New York, New York
January 5, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN, Justice and a Jury

A P P E A R A N C E S:

(For the People)
DONALD MATTHEWS
ASSISTANT DISTRICT ATTORNEY

(For the Defendant)

IRA VAN LEER, ESQ.

Linda Pazzani
Official Court Reporter

[Tr. 2] COURT CLERK: The People of the State of New York against Gregory Johnstone. Indictment Number 110 of 1981.

MR. VAN LEER: Judge, it is the Defendant's desire to go without a lawyer, or without me I would say. He sought another lawyer. I assume he doesn't want me to try the case.

THE COURT: Mr. Johnstone?

THE DEFENDANT: Yes, the papers are here. I got papers here where the man said something was wrong with me.

I submitted this information to him, which is not true. The man told me -- Eileen Bush was my witness three months ago. I am on trial. She is not a witness. I got two more witnesss. I want a new lawyer.

Everytime I was getting denied,

he keeps telling me he might get me out on my own recognizance. I don't want him no more.

THE COURT: Well, you made that application, I guess, before Judge Roberts yesterday?

THE DEFENDANT: What?

THE COURT: You were before Judge Roberts yesterday?

[Tr. 3] THE DEFENDANT: Yes.

THE COURT: And you asked him for another lawyer?

THE DEFENDANT: I have been asking him.

THE COURT: He denied that application?

THE DEFENDANT: Yes, he has been denying me all through my trial.

THE COURT: You went to trial last year?

THE DEFENDANT: Yes, with him. I don't want to go with him.

THE COURT: Well, apparently the Judge that tried the case before, she also said you couldn't have a new lawyer?

THE DEFENDANT: Yes.

THE COURT: Why should I grant your application now Mr. Johnstone, after all these other judges have denied your application?

THE DEFENDANT: I am not going to go to trial with him. I am not going to represent myself I will just be there.

THE COURT: You understand, Mr. Johnstone, that you are in serious trouble because you are charged with a very serious crime.

THE DEFENDANT: I didn't do it.

[Tr. 4] THE COURT: If you are convicted, you can go to jail for up to 15

years.

THE DEFENDANT: I know that.

THE COURT: I mean, this is a very important matter for you.

THE DEFENDANT: If I get convicted --

THE COURT: So, it is in you interest to do everything you possibly can to defend yourself. Because if you do not it is going to be too late later on for you to say, well, maybe I should have defended myself a little bit, if you are convicted.

THE DEFENDANT: Yes, that's why I want to get rid of him.

THE COURT: He is an experienced lawyer.

THE DEFENDANT: Why are you making me keep something that I do not feel comfortable with?

THE COURT: Why is it you do not want Mr. Van Leer to represent you?

THE DEFENDANT: I will show you. I don't want him for that reason.

THE COURT: May I see the file in this case?

COURT CLERK: Yes, Your Honor.

THE COURT: You have given me a motion that Mr. Van Leer made in your behalf in which he said [Tr. 5] that he was going to defend you on the ground that you were not responsible for your acts because of mental problems.

THE DEFENDANT: I didn't give him that information. He said I submitted that information. I didn't submit it.

THE COURT: Apparently, there was something in that regard that Mr. Van Leer thought might support that defense.

What you have to understand,

Mr. Johnstone, is that Mr. Van Leer was doing this for your benefit.

THE DEFENDANT: I don't want him.

THE COURT: If you do not want that defense put in, he is not putting it in on trial, as I understand it, so that is not going to be a factor in this trial. He is not using that on this trial. Apparently he was going to use it on the last trial. Whether he did or not, I don't know.

MR. VAN LEER: It was not imposed at the last one either.

THE COURT: He is not going to use that defense, he just did it to protect you.

THE DEFENDANT: He can't protect me. There ain't nothing wrong with me. I want to go to trial [Tr. 6]

but I do not want to go with him. If I go by myself, I am not going to pick no trial. I am not going to cooperate with it.

THE COURT: Do you understand what is going to happen if you do that?

THE DEFENDANT: I will come down on appeal.

THE COURT: On an appeal?

THE DEFENDANT: Yes.

THE COURT: The appeal is not going to help you any, because what is going to happen, there will be a chance that you will be convicted if you do not put in a defense.

THE DEFENDANT: I won't.

THE COURT: Than if you did put in a defense. I won't grant you another lawyer. Mr. Van Leer is competent lawyer.

THE DEFENDANT: I am not taking him, that is all. If I got to represent myself, I will, just be there. Forget about it.

THE COURT: How old are you?

THE DEFENDANT: Eighteen.

THE COURT: How much education had you had?

THE DEFENDANT: I don't know.

THE COURT: When did you leave school? How [Tr. 7] long ago?

THE DEFENDANT: Before I came here, I was going to school.

THE COURT: How long ago was that?

THE DEFENDANT: Twelve months ago.

THE COURT: Were you about the ninth or tenth grade?

THE DEFENDANT: No, it was no

grade. I was just in a class.

THE COURT: What school were you in?

THE DEFENDANT: Veritas, it was a program. They had me going to school.

THE COURT: A program?

THE DEFENDANT: Yes.

THE COURT: Had you worked at all?

THE DEFENDANT: Yes.

THE COURT: What kind of work have you done?

THE DEFENDANT: I don't know the name of it.

THE COURT: Mr. Johnstone, it really isn't in your interest to do this because you are very young and you have your whole life ahead of you. This is a very, very serious crime that you are charged with. You can go to jail for

about as long as you have been on this earth. Do you understand [Tr. 8] that, if you are convicted?

THE DEFENDANT: So what are you telling me?

THE COURT: I am telling you you have to do everything you possibly can to defend yourself.

THE DEFENDANT: I am trying to get a new lawyer. I am going by myself.

THE COURT: You tried to do that. I denied your application because, at this stage, I cannot grant that application. It has already been turned down by a whole series of other judges. I see no reason to change their decision.

Now, in life you accept certain things and you make the best of it. You cannot have everything your own way. You cannot say, if that is the rule, I am not

going to play the game. You do the best you can.

THE DEFENDANT: So I am going by myself.

THE COURT: You understand what that is going to mean?

THE DEFENDANT: Whatever happens, happens.

THE COURT: Think of how you will feel ten years from now and you are convicted when you say whatever happens, happens.

Maybe with Mr. Van Leer, you could have won [Tr. 9] the case.

THE DEFENDANT: My last trial was lousy, he was talking about feet and distances. He was not talking about nothing else. I do not feel comfortable with him.

THE COURT: You were not

convicted?

THE DEFENDANT: Judge Roberts, whatever his name is, he lied too. He said it was ten to two conviction on my behalf. It was ten to two. Ten people said they could not come to a decision. Two people said it is a possibility that they could come to a decision. So how can it be ten to two decision?

THE COURT: It does not make any difference what it was. What you have to understand is that Mr. Van Leer was your lawyer then, and he accomplished that for you. You were not convicted.

THE DEFENDANT: I was telling him he was not doing nothing. I was telling him what to do.

THE COURT: Well, somebody did something, maybe you ought to try telling him what to do. It did not work out so

bad last time.

THE DEFENDANT: I know. But I am not taking chances with him.

[Tr. 10] THE COURT: What you are saying now is you are giving up?

THE DEFENDANT: I am going by myself.

THE COURT: That means you are giving up?

THE DEFENDANT: I will do it by myself.

THE COURT: How can you do it by yourself?

THE DEFENDANT: I read the minutes every night. I got papers. I was indicted. I know that they said I caused physical injury to a person. On my way out, a lady testified to that. I got my medical report, whatever that thing is. The lady said she was treated in Harlem

Hospital.

As soon as I get the trial to show me some papers. I don't believe what they say, David Smith came to a store and showed him a gun. I don't believe that. I don't believe none of that.

THE COURT: Mr. Johnstone, you just don't have the qualifications, unfortunately, to defend yourself.

Have you ever seen a trial other than your own trial, the last trial?

THE DEFENDANT: No.

THE COURT: You don't have any special training or education, you are only eighteen [Tr. 11] years old and you are faced with a very, very serious crime.

Now, I would like to accommodate you, if I could. But I do not see how I can help you. I cannot grant you that application for a new lawyer at

this stage, in view of the fact Judge Roberts, just yesterday, denied your application. I cannot overrule him, unless there are some other facts that would warrant it. So I cannot do that.

THE DEFENDANT: So, let's proceed with the trial.

THE COURT: I hate to proceed with a trial with somebody who isn't properly represented. Mr. Van Leer is a very competent lawyer.

THE DEFENDANT: I don't want him.

THE COURT: You keep saying that, but --

THE DEFENDANT: He is not going to be sitting next to me.

THE COURT: Mr. Johnstone, you can't defend yourself. You just don't have the qualifications and you are

running a risk.

THE DEFENDANT: You will have to do something.

THE COURT: What are we going to do?

THE DEFENDANT: Get a new lawyer.

[Tr. 12] THE COURT: I can't get you a new lawyer.

THE DEFENDANT: A motion to dismiss this case.

THE COURT: I do not see any basis to dismiss the case.

THE DEFENDANT: All the witnesses lied.

THE COURT: I don't know that they lied.

THE DEFENDANT: You didn't look at the minutes.

THE COURT: Let your lawyer try

to show that they lied.

THE DEFENDANT: I will do it myself. If I go to trial, it is not going to be with him. If you make me go by myself, I will be sitting here. He will pick out his fourteen Jurors and I will not pick out nobody. You cannot force me either.

THE COURT: I can't force you. But what will happen, we will go to trial, if you don't try to help yourself, the chances of your being convicted are going to be high.

THE DEFENDANT: I know.

THE COURT: Is that what you want?

THE DEFENDANT: I will be convicted, but I will come down and I will get another lawyer.

[Tr. 13] THE COURT: I don't

think you will.

THE DEFENDANT: I think I will.

THE COURT: You are taking an awful chance.

THE DEFENDANT: I am going to take it.

THE COURT: Do you know how long fifteen years is?

THE DEFENDANT: Yes, it is a long time. I won't get fifteen years.

THE COURT: You may very well.

THE DEFENDANT: If I did get it, it wouldn't make a difference. I will be out in 1984.

THE COURT: You will be out?

THE DEFENDANT: In 1984.

THE COURT: Why do you say that?

THE DEFENDANT: Because I will be down on my appeal in three years. I got good grounds to come down on appeal.

THE COURT: Suppose you lose the appeal, you might lose the appeal.

THE DEFENDANT: If I lose it, I will deal with it.

THE COURT: I don't know what I can say to you. I have been around a long time, I have a son that is older than you are. I do not consider him [Tr. 14] fully capable of managing his own affairs at that point.

I really do not think, in this serious trouble that you are in, that it would be the wisest course for you to try to defend yourself. You have to make due the best you can, and that is to cooperate with Mr. Van Leer in presenting the best defense you can.

THE DEFENDANT: That man ain't going to represent me. He knows I don't want him.

THE COURT: He is sitting here. He is sitting here and listening to what you are saying. He heard you say you do not want him.

THE DEFENDANT: I told him not to go and come to Court. I am not paying him.

THE COURT: He has a legal duty and obligation to defend you to the best of his ability. He is not interested in convicting you. He managed to get you a hung Jury last time.

THE DEFENDANT: Yes, but if I was represented right, I wouldn't have a hung Jury. I would of had my verdict already.

THE COURT: It seems to me, Mr. Johnstone, that what you ought to do is work out a compromise [Tr. 15] with Mr. Van Leer. You make suggestions to him as

to how he should conduct your defense, and if he thinks it is consistent with his standards to conduct your defense in that fashion, I am sure he will go along with you and conduct your defense in whatever way you want him to.

He has the skills, the training, the education and the experience to conduct a decent defense for you. You do not have any of those things.

THE DEFENDANT: I would be calling him. He doesn't pay attention to me. By the time I finished making a statement then he comes over to me.

THE COURT: He heard what you said and heard why you are unhappy with him, maybe he will pay more attention to you this time.

THE DEFENDANT: I don't want

him. I got a right to another lawyer.

THE COURT: You don't have a right to another lawyer. That is what I am trying to tell you. I cannot give you another lawyer.

THE DEFENDANT: Well, I don't want him. You can't bring me to trial with someone I don't feel comfortable with.

[Tr. 16] THE COURT: Yes, I can.

THE DEFENDANT: Well, bring me to trial. He won't sit next to me.

THE COURT: He will sit wherever I ask him to sit.

THE DEFENDANT: All right, bring me to trial then.

THE COURT: I say you have to think about this.

THE DEFENDANT: I don't want him. Why are you bothering me. I said I

do not want the man point blank. I do not want him. Why you keep bugging me about it. I don't want the man.

THE COURT: You don't have the experience or the training to defend yourself.

THE DEFENDANT: Yes, I do. I will just sit right there.

THE COURT: Is that what you want to do, sit right there and get convicted?

THE DEFENDANT: You can't you give me another Judge, another lawyer.

THE COURT: Mr. Johnstone, you have a right, if you want, to not put in any defense at all, to do absolutely nothing. Let the District Attorney [Tr. 17] prove his case. If he does not prove a case against you, even though you did not do anything at all, you would still be

entitled to an acquittal. Do you understand what an acquittal is? You would be entitled to a verdict of not guilty even if you did nothing at all. The District Attorney still has to prove your guilt beyond a reasonable doubt, do you understant that?

THE DEFENDANT: Yes.

THE COURT: So, if you want to do it, I don't advise it, I will ask Mr. Van Leer to sit next to you, the two of you can sit there and do absolutely nothing.

THE DEFENDANT: Why does he got to be in the courtroom? I don't want him in the courtroom.

THE COURT: I will decide who is in the courtroom. This is my courtroom.

THE DEFENDANT: Well, this is my trial.

THE COURT: It is your trial. I will decide who is in this courtroom. If you do not want him to say anything --

THE DEFENDANT: I don't want him.

THE COURT: That may well be, but I am not going to allow you to represent yourself. I am [Tr. 18] to ask him to sit next to you. You decide what you want to do during the trial. He will do what you want him to do. If you do not want him to do anything at all, that is up to you. All right, Mr. Johnstone?

Mr. Van Leer, I am directing you to sit next to the Defendant and do your best to represent him to the best of your ability.

MR. VAN LEER: Your Honor, the Defendant has other reasons, whatever his reasons are, he has already had certain

frames or references predicated on a whole history of his life. You have to read that history to understand his thoughts. His has a thought pattern and that pattern is what formulates these ideas.

THE COURT: That may well be.

MR. VAN LEER: That is something that it is his way of life that he has lived, his background, his experience. He has already formulated these ideas.

THE COURT: He is not capable of defending himself in a trial.

MR. VAN LEER: He is intelligent, he reads all the minutes. He has all the minutes. He can [Tr. 19] proceed. His anger is generated towards me. It is created towards me, and I don't think what went on in the trial, the fact

that he was so pleased with everything that went on.

On one occasion he told me that he had won $10. He gave me ten dollars to hold for him at the end of the last case. I just gave it back to him yesterday. He gave me the money in November I gave him back the money yesterday.

We had a very friendly descent lawyer/c'ient relationship. His attitude, how it changed somewhere between the conclusion of the other case, I don't know.

I sent an investigator name Wade, and at that point, he said to that investigator he wanted a new lawyer. What generates this attitude towards me now -- Remember, Judge, I have three other cases waiting. My being here with him would only generate disruption or something. I

do not want to disrupt the proceedings.

THE COURT: As a member of the bar and an officer of the Court, it is your duty to defend the Defendant to the very best of your ability. I know that you will do that.

[Tr. 20] I understand your reluctance to participate in this trial in view of the Defendant's expressed desire to be assigned another lawyer.

I turned down that application and I will direct you to participate in this trial consistent with the Defendant's wishes. If he does not want you to actively participate in the trial, that is his wish and you can make that known on the Record that is what his desire is.

MR. VAN LEER: That is not truly his wish. His wish is to have another

lawyer.

THE COURT: I am aware of that. I turned that application down.

Now, let's proceed.

MR. VAN LEER: Well, then, it is a sham, the man should be represented by a lawyer.

THE COURT: You are his lawyer, Mr. Van Leer.

MR. VAN LEER: If I am going to sit here and not participate he is without a lawyer.

THE COURT: That is the Defendant's prerogative, Mr. Van Leer.

MR. VAN LEER: I heard all the witnesses. There were two alleged eyewitnesses that will testify to certain events. It is a circumstantial [Tr. 21] evidence case. These witnesses will testify to certain events.

Now, it becomes crucial to him that someone cross-examine those witnesses to find out where the truth is.

THE COURT: You may explain that to him. If he does not want you to cross-examine them, that is his prerogative. If he wishes you to remain silent, he has that right.

MR. VAN LEER: He may want to cross-examine himself.

THE COURT: You are conducting this defense, not the Defendant.

MR. VAN LEER: If I am conducting this Defense, then I must run it in a manner I feel is legally proper. If he runs it, it will be Johnstone on evidence, and that is not the rule.

THE COURT: Mr. Van Leer, if he does not want you to actively participate, then you may state, on the

Record, that the Defendant does not wish you to [Tr. 22] cross-examine a particular witness, and that will be it. If he does not want you to make an opening statement to the Jury, you may state that the Defendant has indicated he does not wish you to open to the Jury. If he does not want you to sum up, you may so state at the appropriate time. You may advise the Defendant it is in his interest, if you think so, to cross-examine the witness and to open or to sum up, if you believe that those steps are in the Defendant's interest. If he does not choose to follow your advise, he is the Defendant, he is on trial, and he has the right to make that election.

I will direct you to participate to the extent I have indicated and to sit a Counsel table with

the Defendant.

MR. VAN LEER: There is a basic concept in the law in reference to a 730 examination. Now, 730 examinations are all predicated pursuant to the Criminal Procedure Law related to whether the Defendant aids in his defense, can the Defendant aid in his defense.

THE COURT: Has that application been made in that connection?

MR. VAN LEER: Well, if we are going to come to this point now where I must raise the question if he did not aid in his defense then the 730 aspect will have been germane at this point, and should be.

[Tr. 23] THE COURT: I do not understand that?

MR. VAN LEER: Well, 30.05, and 730, 730 relates to being able to

communicate, set up defense.

THE COURT: You are talking about a motion that you propose to make pursuant to some section of some statute?

MR. VAN LEER: We are talking about what the Judge's ruling is to me, if the Judge says sit down next to the Defendant, the Defendant will say to you, or the only thing he may say to me is don't do this, don't do that. Therefore, there is a failure of my communication under 730 to get a defense. Where the whole principle o 730 relates to the primary purpose of being able to communicate with the Defendant.

THE COURT: I have seen no indication that the Defendant is incompetent, or in any way, unable to communicate with his lawyer.

What he has indicated is a lack

of desire to communicate with his lawyer. He is making a voluntary decision, apparently, that he does not want to communicate with Counsel.

MR. VAN LEER: I ask the Court to inquire then as to see whether that is intelligently [Tr. 24] authenticated.

THE COURT: I have been doing that for the last fifteen minutes.

MR. VAN LEER: You are putting me in a positic to sit and defend and not be able to communicate.

THE COURT: I did not say you could not communicate, I said --

MR. VAN LEER: He is not going to talk to me.

THE COURT: I don't know whether he is going to talk to you or not. He will convey instructions to you that he does not want you to do certain things or

he does.

MR. VAN LEER: That is where the issue comes in under 730.

THE COURT: I do not follow you and we do not agree.

Let's proceed please.

MR. VAN LEER: Let me ask a question then. Will we talk to one another?

THE DEFENDANT: I don't want you next to me.

THE COURT: I heard him, I already ruled on that.

Mr. Van Leer, please be seated.

MR. VAN LEER: You are putting me in jeopardy [Tr. 25] I will not be put in jeopardy in this courtroom. I have certain right also.

THE COURT: I will direct you to be seated. I do not understand what

jeopardy you are being placed in?

MR. VAN LEER: He will forcefully not want me here.

THE COURT: The Court Officers are here, I do not think you are in any physical jeopardy. Be seated, please.

MR. MATTHEWS: Your Honor, first of all, I would just like to point out for the Court some information, since the Court just got this case yesterday.

This man has had a 730 examination and he has been found competent.

THE COURT: I see no indication that the Defendant is not competent. He seems perfectly competent.

I think he is being stubborn and is not thinking things through. I see no indication he is not competent.

MR. MATTHEWS: Your Honor, I

would like to clarify, in my own mind, perhaps I am not understanding [Tr. 26] fully what the Court said -- The Defendant is now going to proceed in this trial pro se, on his own?

THE COURT: He is not proceeding pro se, Mr. Van Leer is his attorney. I made that absolutely clear.

MR. MATTHEWS: Yes, you Honor.

THE COURT: I will instruct you to participate in this trial to the extent the Defendant wishes. If you feel that he wishes you to violate some standard that you have, make that known to the Court, not in the presence of the Jury.

MR. VAN LEER: Let's get it so we understand what we are doing.

THE COURT: I think we understand what we are doing.

MR. VAN LEER: The only issue

now is, at least the issue as I see it, is providing the Defendant is not going to communicate with me --

THE COURT: I don't know whether he is going to communicate with you or not. Apparently you haven't made any effort to communicate with him.

The first step is to select a Jury and inquire whether he wishes that. That is the first step you ought to get ready for.

[Tr. 27] MR. VAN LEER: We must first talk to one another.

THE COURT: Why don't you make an effort to privately talk with your client in this case.

MR. VAN LEER: I will ask him in open Court. Do you wish to talk to me?

(Off the Record discussion.)

THE COURT: Bring the Jury in,

please.

MR. MATTHEWS: There is something else, most respectfully, and I have a great deal of respect for the Court.

I think, your Honor, that the question should be clarified as to whether --I am sorry, the Court is obviously denying the Defendant's right to proceed pro se.

I think, your Honor, there may be some problem with that. I think he may have the right to proceed pro se.

THE COURT: I read the cases. I do not think that the Defendant has the requisite education, background or training or experience to appear, pro se, in this case.

The leading cases, People against McIntyre, and the Court in this

case determined the Defendant's [Tr. 28] competence to waive Counsel. The Court made proper inquiry to the Defendant's age, education, occupation annd previous exposure to legal procedures.

The Record has indicated that the Defendant is eighteen, he has had scarecely any formal education so far as I can ascertain, he has no known occupation and he has virtually no previous exposure to legal procedures, except for the first trial. I do not think that qualifies him to represent himself.

I don't think he can knowingly waive his rights to Counsel.

MR. MATTHEWS: I am not disagreeing with the Court's factual findings.

THE COURT: Let's bring the Jury in, please.

(Whereupon the Jury entered the courtroom.)

THE COURT: I am sorry, ladies and gentlemen, for the delay this morning. We had some legal matters that we had to cope with before we commenced our Jury selection procedure.

For those of you who are unfamiliar with the process, what we are doing this morning is selecting a Jury in a criminal case. It is called the voir dire procedure. It's purpose is to select twelve completely fair and impartial Jurors.